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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JESUS X. MIRAMONTES,)	CASE No.: 2:15-CV-05689-SJO-AFM
individually, and as a representatives of)	PLAINTIFF'S MOTION FOR
the class,)	ATTORNEY'S FEES AND
)	APPROVAL OF ENCHANCEMENT
Plaintiffs,)	AWARD
vs.)	
)	Judge: Hon. S. James Otero
U.S. HEALTHWORKS, INC.; and)	
DOES 1-10 inclusive,)	Hearing Date: July 17, 2016
Defendants.)	Time: 10:00 a.m.
)	Location: Courtroom 1, Spring Street

TABLE OF CONTENTS

MEMORANDUM OF POINTS AND AUTHORITIES.....	1
I. INTRODUCTION	1
II. PROCEDURAL POSTURE AND SETTLEMENT DISCUSSIONS	2
III. THE REQUESTED FEES SHOULD BE GRANTED	4
A. Legal Standard.....	4
B. The Novelty and Difficulty of the Question Involved Make This Case Extremely Risky at its Inception	5
C. PROJECTED BENEFITS ARISING FROM THE SETTLEMENT	7
D. The Time and Labor Required Exceeds the Requested Amount	8
E. This Action Was Complex and Taken On a Contingency Fee Basis	10
IV. THE COURT SHOULD AWARD THE REQUESTED EXPENSES.....	10
V. THE COURT SHOULD GRANT AN INCENTIVE AWARD TO PLAINTIFF	11
VI. CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
<i>Beckman v. KeyBank, N.A.</i>	
293 F.R.D. 467 (S.D.N.Y. 2013).....	13
<i>Chakejian v. Equifax Info. Servs., Inc.</i>	
275 F.R.D. 201 (E.D. Pen. 2011).....	9
<i>Delphi Corp. Sec., Derivative & “ERISA” Litig.</i>	
248 F.R.D. 483 (E.D. Mich. 2008).....	9
<i>Domonoske v. Bank of America, N.A.</i>	
790 F.Supp.2d 466 (W.D. Va. 2011).....	6
<i>In re Mercedes-Benz Tele Aid Contract Litig.</i>	
2011 WL 4020862 (D.N.J. Sept. 9, 2011).....	9
<i>McHugh v. Olympia Entm’t, Inc.</i>	
37 F.App’x 730 (6th Cir. 2002).....	9
<i>Paul, Johnson, Alston & Hunt v. Graulty</i>	
886 F.2d 268 (9th Cir. 1989).....	4
<i>Resnick v. Fran (In re Online DVD-Rental Antitrust, Litig.)</i>	
779 F.3d 934 (9th Cir. Feb. 27, 2015).....	4
<i>Smith v. LexisNexis Screening Sols., Inc.</i>	
837 F.3d 604 (6th Cir. 2016).....	6
<i>Spano v. Boeing Co.</i>	
2016 WL 3791123 (S.D. Ill. Mar. 31, 2016).....	8
<i>Spokeo, Inc. v. Robins</i>	
136 S.Ct. 1540 (2016).....	1, 3, 5, 6
<i>Stanger v. China Elec. Motor, Inc.</i>	
812 F.3d 734 (9th Cir. 2016).....	4

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2

3 **I. INTRODUCTION**

4

5 Plaintiff by and through his Class Counsel submits this motion for an award of

6 attorney's fees and costs in an amount not to exceed 33 and 1/3% or \$133,333.33 of

7 the Settlement Fund and \$13,632.80 in costs. A service award of \$5,000 for the

8 named Plaintiff and \$22,500 for the class administrator. Class Counsel is mindful of

9 the Ninth Circuit's benchmark of 25% of the common. However, Plaintiff believes

10 that several factors warrant an upward adjustment from the benchmark.

11 From its inception, this case was extremely risky because there is no precedent

12 for the consumer credit report claims brought by Plaintiff. The relevant provisions of

13 the California Consumer Credit Reporting Agencies Act ("CCRAA") and California

14 Labor Code became effective on January 1, 2012. To date, Class Counsel is aware of

15 no substantive decision from any state or district court on these issues. Class Counsel

16 is also unaware of any class settlement where similar claims have been resolved.

17 There was also a significant amount of uncertainty surrounding Plaintiff's Fair

18 Credit Reporting Act ("FCRA") claims as the parties were waiting for the United

19 States Supreme Court's decision in *Spokeo v. Robins*, 136 S.Ct. 1540 (2016) relating

20 to a consumer's standing to bring FCRA claims in federal court. In order to recover

21 statutory penalties, Plaintiff must also establish willful violation of the respective

22 statutes. In the case of the CCRAA claims, this Court also noted a requirement to

23 establish actual damages which render class certification difficult.

24 Nevertheless, Class Counsel was able to achieve a settlement that Class

25 Counsel sincerely believes to be fair and reasonable. Class Counsel prosecuted this

26 action on a contingency fee basis and advanced all fees and costs despite the above-

27 stated risks. The named Plaintiff Mr. Jesus X. Miramontes also selflessly advanced

28 the interests of the class despite his desire to prosecute this action under a

1 pseudonym. Although, Defendant was ultimately successfully in forcing Plaintiff to
2 reveal his true identity, he nevertheless continued in this action in hope of changing
3 Defendant's screening procedures. Additionally, had Mr. Miramontes prosecuted this
4 action on an individual basis, he would likely have recovered more money.

5 Based on the foregoing, Class Counsel respectfully request this Court to grant
6 Plaintiff's requested fees, costs, administration fees and an incentive award of \$5,000
7 for Mr. Miramontes.

8 9 **II. PROCEDURAL POSTURE AND SETTLEMENT DISCUSSIONS**

10
11 This action was initially filed on July 27, 2015 in this Court. Plaintiff initially
12 used prosecuted this action under the pseudonym John Doe. Declaration of Jesus X.
13 Miramontes ("Miramontes Decl."), P.1, ¶5. On or about November 10, 2015,
14 Defendant filed its motion to dismiss attacking Plaintiff's use of a pseudonym.
15 Docket#12.

16 Since the convictions at issue have been expunged prior to the filing of this
17 lawsuit, Plaintiff was afraid that a google search would reveal his expunged
18 convictions to prospective employers. Miramontes Decl., P.1, ¶5. Moreover, an
19 employer who has discovered this class action lawsuit may also believe that he is
20 litigious. *Id.*

21 Defendant's motion was granted on February 4, 2016 with leave to amend.
22 Docket#24. After careful consideration, Plaintiff decided to forgo his anonymity and
23 continued to maintain this action in his true name because he believed that stopping
24 Defendant's practice of procuring consumer credit reports would benefit the public at
25 large. Miramontes Decl. P.2, ¶8.

26 While the motion was pending, the parties discussed the potential for
27 settlement. On or about March 9, 2016, Plaintiff served on Defendant an extensive
28 informal discovery demand including, but not limited to: 1) job descriptions of all

1 positions in California for which Defendant accepted an employment application
2 during the class period; 2) class size information, including but not limited to, total
3 number of employment applications during the class period; total number of
4 employment applications in California for which Defendant procured a credit report;
5 total number of applicants denied employment as a result of a background check
6 report; and 3) all sample disclosure forms used during the class period. Plaintiff's
7 counsel conditioned their willingness to participate in mediation based on his receipt
8 of the requested document.

9 On or about April 14, 2016, Defendant provided responsive documents and
10 Plaintiff analyzed the data including whether any of the positions fall within the
11 enumerated exceptions of Cal. Lab. C. §1024.5(a) allowing Defendant to legally
12 procurement employment credit reports.

13 On May 17, 2016, the parties attended a full day of mediation with Mr. David
14 A. Rotman in San Francisco. The parties were unable to resolve this case and
15 settlement negotiations continued by phone following mediation.

16 One day prior to the parties' mediation and on May 16, 2016, the United States
17 Supreme Court issued a ruling on a highly anticipated FCRA case in *Spokeo, Inc. v.*
18 *Robins*, 136 S.Ct. 1540 (2016) related to federal standing for claims brought under
19 the FCRA which created significant amount of uncertainty in this case even after its
20 decision. Accordingly, Plaintiff refiled a parallel action in state court to preserve the
21 statute of limitations on Plaintiff's claims. Since, California state courts are courts of
22 general jurisdiction, the issues of federal standing will have no impact on Plaintiff's
23 class claims. The parallel action was subsequently removed by Defendant and
24 consolidated with this case.

25 On or about July 5, 2016, the parties reached a tentative settlement agreement
26 on most of the key terms. No discussion of Plaintiff's counsel's attorney's fees had
27 been held. Plaintiff's attorney's fees of 33 and 1/3% and the smooth sailing provision
28 was raised, for the first time at 11:48 p.m. on July 5, 2016 as one of the last items of

1 discussion. The fee percentage and the smooth sailing provision were never discussed
2 in the context of an exchange for any class member's rights. They were never used as
3 a bargaining tool. Indeed, the Settlement Agreement specifically provides that the
4 Settlement is not conditioned upon the outcome of the attorney's fee's award.
5 Settlement Agreement ("SA"), §9.2, P. 15. No class member's rights, no matter how
6 important or trivial were given up in exchange.

7 Plaintiff's motion for Preliminary Approval was filed on September 24, 2016.
8 Docket#54. This Court conditionally granted Plaintiff's motion with a few noted
9 reservations. They were subsequently addressed on March 28, 2017 where the
10 Settlement Agreement and class notice was amended. *See* Order granting the same
11 dated April 3, 2017. Docket#65. On July 3, 2017, the parties have also filed a Joint
12 Statement addressing this Court's concerns.

13 14 **III. THE REQUESTED FEES SHOULD BE GRANTED**

15 16 **A. Legal Standard**

17
18 "In a common fund case, such as this, the district court has the discretion to
19 choose between either the lodestar or the percentage-of-fund methods when
20 calculating fees." *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738 (9th Cir.
21 2016). "Because there is a strong presumption that the lodestar amount represents a
22 reasonable fee, adjustments to the lodestar are the exception rather than the rule." *Id.*
23 Internal citations and quotations omitted. Here, as fully set forth below, Plaintiff's
24 actual lodestar is 315.9 attorney hours spent totaling \$157,285. This is greater than
25 the fees requested.

26 "Under the percentage-of-fund method, the district court may award plaintiffs'
27 attorneys a percentage of the common fund, so long as that percentage represents a
28 reasonable fee." *Id.* The Ninth Circuit has set 25% of the fund as a "benchmark"

under the percentage-of-fund method. *Id.* “That percentage amount can then be adjusted upward or downward to account for any unusual circumstances involved in this case.” *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir. 1989). The relevant factors include: 1) the extent to which class counsel “achieved exceptional results for the class”; 2) whether the case was risky for class counsel; 3) whether counsel’s performance generated benefits beyond the cash settlement fund; 4) the market rate for the particular field of law (in some circumstances), the burden class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and 5) whether the case was handled on a contingency basis. *Resnick v. Fran (In re Online DVD-Rental Antitrust, Litig.)*, 779 F.3d 934 (9th Cir. Feb. 27, 2015).

B. The Novelty and Difficulty of the Question Involved Make This Case Extremely Risky at its Inception

Plaintiff’s claims regarding Defendant’s illegal procurement of employment credit reports in violation of CCRAA, Cal. Civ. C. §1785.20.5 and Labor Code §1024.5 as well as the derivative PAGA action is the first of its kind. To date, Plaintiff’s counsel is unaware of any action involving similar claims that have resulted in legal precedent or settlement. At the time this action was filed, the relevant legal statutes had been in existence for approximately three and a half years.¹ Accordingly, the issues were novel and Plaintiff and his counsel undertook significant risks to prosecute this action.

At the same time, the United States Supreme Court granted certiorari on *Spokeo v. Robins*, 742 F.3d 409 (9th Cir. Cal. 2014) and was considering the issue of federal standing in the context of the FCRA. The question in *Spokeo* was “[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete

¹ Both statutes became effective on January 1, 2012.

1 harm, and who therefore could not otherwise invoke the jurisdiction of the a federal
2 court, by authorizing a private right of action based on a bare violation of a federal
3 statute.” See Questions Presented, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. April
4 27, 2015), available at www.supremecourt.gov/qp/13-01339qp.pdf. A defendant-
5 friendly result in *Spokeo* could have significantly impacted this lawsuit. In the worst
6 case scenario, it could have resulted in a dismissal.

7 *Spokeo* was issued the day prior to the parties’ mediation which caused
8 significant stress on the parties’ ability to resolve this action. Moreover, Plaintiff was
9 forced to file a parallel state court action to insulate the risk of an adverse ruling
10 based on *Spokeo* by this Court as state courts are courts of general jurisdiction where
11 the concept of federal standing does not apply. Had a settlement not been be reached
12 in this case, the parties would have been mired in procedural motions with uncertain
13 outcomes.

14 Plaintiff also faced risks on the substantive legal issues including willfulness
15 for both the FCRA and the California claims. Unlike other consumer statutes, in order
16 to recover statutory damages under the FCRA, Plaintiffs must prove not only that
17 Defendant violated the FCRA, but also that Defendant’s violations were willful. This
18 is a very high standard, and one on which FCRA plaintiffs can lose, even after a
19 successful verdict at trial. See *Smith v. LexisNexis Screening Sols., Inc.*, 837 F.3d 604,
20 611 (6th Cir. 2016) (reversing jury verdict, holding that consumer reporting agency’s
21 conduct did not constitute a willful violation of the FCRA); *Domonoske v. Bank of*
22 *America, N.A.*, 790 F.Supp.2d 466, 476 (W.D. Va. 2011) (“[G]iven the difficulties of
23 proving willfulness or even negligence with actual damages [under the FCRA], there
24 was a substantial risk of nonpayment.”).

25 Plaintiff’s California claims are even harder to prove. As this Court has stated
26 in its preliminary approval order, “each class member will have to demonstrate actual
27 injury before being entitled to punitive damages.” Docket#57, P.11. Since a vast
28 majority of the class members did not suffer any actual damages, this would defeat

1 certifiability under Rule 23(b)(3). *See Id.* While Plaintiff continues to believe that
2 they would have ultimately prevailed on each of these issues, he recognizes the
3 inherent risk of litigation and potentially proceeding to trial. By agreeing to the
4 Settlement, those risks are eliminated and participating class members will receive an
5 excellent recovery.

6 7 **C. PROJECTED BENEFITS ARISING FROM THE SETTLEMENT**

8
9 Despite these significant risks, Plaintiff's counsel was able to negotiate a
10 settlement that is comparable if not exceed other FCRA settlements. Assuming that
11 the attorney's fees, costs, plaintiff's awards, administration costs, and payment to the
12 California Labor & Workforce Development Agency ("LWDA") is granted as
13 requested, the net recovery of each individual class member will be a minimum of
14 \$36.61 per point allocation. *See* Declaration of Corinne Lefler Re: Notice Procedures
15 ("Lefler Decl."), P. 3-4. The average per member allocation is approximately \$41.81
16 with a maximum allocation of \$475.93 for members belonging in multiple classes.

17 Based on the current allocation, all FCRA Disclosure Class members will
18 receive a minimum of \$36.61. All FCRA Notice Subclass members will receive a
19 minimum of 11² points or \$402.71. All CCRAA class members will receive a
20 minimum 6 points or \$219.66 and all PAGA class members will receive a minimum
21 of 7 points or \$256.67.

22 As this Court noted in its preliminary approval order, this falls well within the
23 range of other FCRA settlement. Docket#57, P.16-17. Moreover, Plaintiff is unaware
24 of any class action where class members have received any class settlement based on
25 an employer's violation of the CCRAA. Accordingly, Plaintiff's counsel has achieved
26 something that has not been done before.

27
28

2 ² They are necessarily also a member of the FCRA Disclosure Class.

1 In addition to the monetary relief, CCRAA class members will be entitled to
2 receive a free copy of their consumer reports. Defendant has also agreed that for a
3 period of no less than five years beginning on the date of final approval, Defendant
4 will provide notice compliant with CCRAA, Cal. Civ. C. §1785.20.5 prior to
5 procuring any consumer credit reports. Defendant must identify the specific
6 enumerated exception for which a consumer credit report is allowed to be procured.
7 This injunctive relief requires Defendant to engage in an individualized analysis as to
8 whether the position sought falls within one of the enumerated exceptions under Cal.
9 Lab. C. §1024.5. Therefore, Defendant can no longer conduct wholesale procurement
10 of consumer credit reports on all applicants. Plaintiff's counsel believes that for all
11 intents and purposes, this lawsuit has effectively stopped Defendant's practice of
12 procuring consumer credit reports except for certain very limited purposes.

13 Finally, this settlement was well received by the class members. To date, there
14 are only four opt-outs and no objections. Lefler Decl., P.3, ¶8. This represents less
15 than .1% of all class members. Based on the foregoing, Plaintiff respectfully submits
16 this action has conferred significant benefit to the class.

17
18 **D. The Time and Labor Required Exceeds the Requested Amount**
19

20 As of today, Mr. Devin H. Fok, the principal of DHF Law, P.C spent 85.2
21 hours in this action. Mr. Joseph Lee, an attorney working with his firm has spent 76.4
22 hours. Mr. Joshua E. Kim, one of the primary litigation attorneys at A New Way of
23 Life Reentry Project and is co-lead counsel of this matter with Mr. Fok spent 154.3
24 hours on this matter. The total attorney hours is therefore 315.9 hours. The billing
25 rate for each of the attorneys is \$625, \$425, and 450 respectively. The billing rates for
26 Mr. Fok and Mr. Kim have recently been approved on September 30, 2016 as
27 reasonable "compared to other rates this Court has seen in similar cases in this
28 community" by Judge Cynthia Bashant of the United States District Court, Southern

1 District of California in a similar FCRA action. *Watkins v. HireRight, Inc.*, 3:13-cv-
2 01432-BAS-BLM, Doc. #153, P.6. Judge Bashant found that “counsel is skillful and
3 experienced and negotiated an excellent result for the class, obtaining both monetary
4 and injunctive relief, and that the counsel obtained this relief despite raising a novel
5 legal issue and assuming significant up-front costs for bankruptcy counsel.” *Id.*

6 Other courts have approved similar rates in FCRA class actions. *See e.g.*,
7 *Spano v. Boeing Co.*, 2016 WL 3791123 at *3 (S.D. Ill. Mar. 31, 2016) (approving
8 hourly rates of \$460 to \$998 for attorneys, \$309 for paralegals, and \$190 for legal
9 assistants); *Chakejian v. Equifax Info. Servs., Inc.*, 275 F.R.D. 201, 216–17 (E.D.
10 Penn. 2011) (finding hourly rates up to \$700 for partners are reasonable for
11 experienced class counsel in a FCRA class action); *In re Mercedes-Benz Tele Aid*
12 *Contract Litig.*, 2011 WL 4020862, at *7 (D.N.J. Sept. 9, 2011) (finding reasonable,
13 in consumer class action settlement, hourly rates up to \$855 for partners and up to
14 \$560 for associates); *Laffey Matrix*, 7 <http://www.laffeymatrix.com/see.html> (last
15 visited July 3, 2017) (setting forth rates between \$343 and \$826 for attorneys of
16 similar experience levels). In determining a reasonable hourly rate, courts may look at
17 “national markets, an area of specialization, or any other market they believe is
18 appropriate to fairly compensate attorneys.” *McHugh v. Olympia Entm’t, Inc.*, 37 F.
19 App’x 730, 740 (6th Cir. 2002) (citing *Louisville Black Police Officers Org. v. City of*
20 *Louisville*, 700 F.2d 268, 278 (6th Cir. 1983)).

21 Based on the requested rates Class Counsel’s fees total \$157,285.00.
22 Significant amounts of attorney time were devoted to: 1) analyzing Defendant’s
23 informal discovery responses related to class claims and class size; 2) settlement of
24 this matter including mediation, settlement communications, draft and revisions of
25 the settlement agreement; 3) pre-settlement and post-settlement motion practice
26 including Defendant’s motion to dismiss, Plaintiff’s motion to proceed under
27 pseudonym; Motion for Preliminary Approval as well as this motion; and 4) research
28 regarding various novel and complex substantive and procedure issues surrounding

1 this case. This amount is greater than the \$133,333.33 sought. Based on the
2 foregoing, Plaintiff respectfully submits that this factor of the analysis warrant an
3 upward adjustment from the 25% benchmark.

4
5 **E. This Action Was Complex and Taken On a Contingency Fee Basis**

6
7 Class actions are, by their very nature, complicated and time-consuming. *In re*
8 *Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 504 (E.D. Mich.
9 2008) ("most class actions are inherently complex"); *Beckman v. KeyBank, N.A.*, 293
10 F.R.D. 467, 479-80 (S.D.N.Y. 2013). This is particular true here, where Plaintiffs had
11 the burden of proving Defendant acted willfully to establish liability.

12 Nevertheless, Plaintiff's counsel undertook this action on a contingency fee
13 basis advancing all fees and costs. Based on the foregoing, this factor also weighs in
14 favor of awarding the requested fees.

15
16 **IV. THE COURT SHOULD AWARD THE REQUESTED EXPENSES**

17
18 The requested costs are \$13,632.80. As fully detailed in the attached exhibits, a
19 significant portion of the costs is Plaintiff's portion of 50% of Mr. David Rotman's
20 mediation fees. This amount is \$10,750.00. The balance is attributable to the federal
21 (\$400) and parallel state complex complaint filing fees (\$1,435.00) totaling
22 \$1,835.00. Moreover, Plaintiff's counsel incurred various travel expenses in
23 connection with the mediation as well as courier fees for the service of the complaint
24 as well as pacer fees. Plaintiff's counsel believes that these amounts are reasonable
25 under the circumstances.

26 The class administrator has also incurred expenses of \$22,500 in the
27 distribution of notices as well as issuance of checks to class members. In choosing the
28 class administrator handle the notice and claims process in this matter, Class Counsel

sought competitive bids from several reputable firms. The subject class administrator's costs and fees and the lowest amongst the bids submitted. The requested settlement administration costs cover, among other things, expenses incurred or estimated to be incurred for preparing the class list, preparing and mailing notices, processing opt-outs, postage, corresponding with Class Members, and phone support. The requested administration costs are fair and reasonable, and should be reimbursed from the common fund. See *Newberg on Class Actions* § 12:20 (5th ed.) ("The[] costs of paying the claims administrator, processing the claims, providing notice to the class, and generally administering the settlement is typically deducted from the settlement fund.").

V. THE COURT SHOULD GRANT AN INCENTIVE AWARD TO PLAINTIFF

As fully set forth in Mr. Miramontes' declaration, Mr. Miramontes provided a valuable service to the class members in this case. Despite Defendant's vigorous defense forcing Plaintiff to disclose his true identity. He risked exposing his true name to other employers who could find out about his expunged records from this case or to deny him employment based on a belief that he is litigious. Declaration of Jesus X. Miramontes ("Miramontes Decl."), P. 1, ¶5. Nevertheless, Mr. Miramontes sought to represent the class based on his sincere believe that if he does not continue to prosecute this action, "U.S. Healthworks will continue their unlawful activity and keep hurting others like myself." Miramontes Decl., P. 1, ¶6. Moreover, Mr. Miramontes spent considerable time and effort into being informed of both of the development of this case as well as the settlement terms. Miramontes Decl., P. 2, ¶¶11-15. Accordingly, Class Counsel respectfully request this Court grant an incentive award of \$5,000 to Plaintiff Miramontes.

//

1 **VI. CONCLUSION**

2
3 Based on the foregoing, Class Counsel respectfully requests this court for an
4 award of attorney's fees and costs in an amount of \$133,333.33 and \$13,632.80 in
5 costs. Class Counsel also respectfully requests the grant of a service award of \$5,000
6 for the named Plaintiff and \$22,500 for the class administrator.

7
8 DATED: July 3, 2017

DHF LAW, P.C.

9 By: /s/ Devin H. Fok
10 Devin H. Fok
11 Attorney for Plaintiff

12 **DHF LAW, P.C.**

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28

E-FILING ATTESTATION

By his signature below, counsel for Plaintiff attests that he has on file all holographic signatures corresponding to any signatures indicated by a conformed signature (/s/) within this e-filed document and any document e-filed concurrently herewith.

DATED: July 3, 2017

DHF LAW, P.C.

By: /s/ Devin H. Fok

Devin H. Fok

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